



Reinhardt at Work

Citation

Benjamin Sachs, Reinhardt at Work, 120 Yale L.J. 573 (2010).

Published Version

<http://www.yalelawjournal.org/images/pdfs/928.pdf>

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THE YALE LAW JOURNAL

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Reinhardt at Work

In his thirty years as a judge, Stephen Reinhardt has authored more than 150 labor and employment opinions for the Ninth Circuit.¹ Indeed, it would be hard to identify a single question concerning the law of work about which Judge Reinhardt has not written at least one major decision. In addition to its sheer size and scope, Judge Reinhardt's jurisprudence also reflects a remarkable grasp of the overall structure of U.S. labor and employment law. From questions as fundamental as who is an employee² and what constitutes work,³ to issues as complex and esoteric as how to define *common situs* picketing,⁴ the Judge is at home and at ease in this area of law. At their best, Reinhardt's labor and employment opinions display a technical virtuosity impressive to both seasoned practitioners and legal academics. This feature of his opinions should come as no surprise: Judge Reinhardt practiced as a labor lawyer before taking the bench in 1980 (making him nearly unique among his colleagues on the

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1. According to a search of both LexisNexis and Westlaw, Judge Reinhardt is the author of 153 majority opinions in labor and employment cases, including panel and en banc decisions.
2. See, e.g., *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981).
3. See, e.g., *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004).
4. See, e.g., *NLRB v. Ironworkers Local 433*, 850 F.2d 551 (9th Cir. 1988). As the leading treatise defines it, "[a] *common situs* is a site on which two or more employers are engaged in normal business operations." 2 SECTION OF LABOR & EMP'T LAW, AM. BAR ASS'N, THE DEVELOPING LABOR LAW § 22.II.C.2, at 1768 (John E. Higgins, Jr. et al. eds., 5th ed. 2006). The issue is relevant to the question of whether picketing is permissible. See *Ironworkers Local 433*, 850 F.2d at 553-54.

federal courts of appeals⁵), and he came to his judgeship already possessing a firm grasp of the statutory and decisional landscape.

But the Judge's labor and employment jurisprudence is defined by more than its scope and technical accomplishment. In fact, Judge Reinhardt's writing in these areas is recognizable both for a consistent substantive vision of what labor and employment law intends to accomplish and for the Judge's method of interpreting these statutes. The substantive theme that runs through these opinions is a straightforward one: labor and employment statutes are written to enable workers' own efforts to make their lives better. He views the law as a vehicle for, and a facilitator of, worker empowerment—a view, at bottom, that labor and employment statutes do not merely grant particular workplace rights, but, perhaps more importantly, enable workers to fight for themselves.

Running alongside this substantive vision of labor and employment law is a tool of interpretation that the Judge deploys to resolve these cases. Namely, the Judge relies on his own understanding—informed by years of practice—of how law actually operates in the world of work, in the world of union organizing, and in the world of labor-management relations. His opinions are full of references to what the Judge, humbly of course, refers to as “reality”—the “realities of collective bargaining,”⁶ the “reality of day-to-day labor relations,”⁷ and “the practical realities of labor-management relations.”⁸ What these phrases capture is the Judge's insistence that labor and employment statutes be interpreted *pragmatically*. He demands that the court understand how things actually work before deciding how the law should be construed.

Although many cases could be cited to highlight these themes, three will serve our purpose here. The first concerns the scope of the anti-retaliation clause of the Fair Labor Standards Act (FLSA).⁹ The second deals with the ability of undocumented immigrant workers to assert rights granted by Title VII of the Civil Rights Act of 1964.¹⁰ And the third takes up the ability of unions to spend dues money on organizing new workers.¹¹ Because each of

5. Though not entirely unique: for example, Judge Marsha Berzon, also of the Ninth Circuit, was a prominent labor attorney before joining the court.

6. *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 768 (9th Cir. 2002) (en banc).

7. *Ironworkers Local 433*, 850 F.2d at 556.

8. *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985).

9. *See Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (en banc).

10. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

11. *See UFCW, Local 1036*, 307 F.3d 760.

these opinions is significant in a number of additional ways—beyond the two themes that are the focus here—this Feature will also note some of the cases’ broader implications.

I. ANTI-RETALIATION PROTECTION

Judge Reinhardt’s concern for worker empowerment—his view of the law as protecting workers’ ability to fight for themselves, not simply as extending workplace entitlements—is expressed first and foremost in cases dealing with employer retaliation. Perhaps the best example comes in the context of the Fair Labor Standards Act. The FLSA sets the federal minimum wage and requires that covered employees receive overtime premium pay: if a covered employee works more than forty hours in a week, she is entitled to earn one and one-half times her regular rate for the overtime hours.¹² The statute, through its anti-retaliation clause, also offers protection to employees who seek to enforce these rights.¹³

In the early 1990s, the Seattle SuperSonics (Sonics)—at the time, an NBA basketball team—began paying its ticket sales agents \$166.67 a month in “overtime pay” regardless of how many hours of overtime the agents actually worked.¹⁴ Believing, correctly, that this pay scheme was illegal and in contravention of the FLSA’s overtime provisions, a group of sales agents decided to request that management reform the pay practice. They chose two “representatives” to deal with management—including the named plaintiff, Laura Lambert—and succeeded in convincing the Sonics’s management to pay the agents the actual overtime wages that were owed. Nonetheless, less than a week after the Sonics settled the workers’ overtime claim, the team reorganized its ticket sales operations. As a result, all of the agents involved in the effort to secure overtime pay were fired; in fact, the one agent not dismissed by the Sonics was the one agent who had not complained about the Sonics’s payment scheme.¹⁵

The case seemed like a clear-cut example of illegal retaliation. A Seattle jury agreed: it awarded the agents nearly \$700,000 in lost wages and \$12 million in punitive damages.¹⁶ On appeal, however, a three-judge panel of the Ninth

12. See 29 U.S.C. §§ 201, 206–207 (2006).

13. See *id.* § 215(a)(3).

14. See *Lambert*, 180 F.3d at 1001.

15. See *id.* at 1001–02.

16. See *id.* at 1002. The punitive damages award was remitted to approximately \$4 million. See *id.*

Circuit held that the anti-retaliation clause of the FLSA does not apply when workers complain to their employers about violations of the Act.¹⁷ The clause makes it illegal for an employer to discharge or discriminate against any employee because the employee has “filed any complaint . . . under or related to this chapter.”¹⁸ The panel read the statutory term “filed” to mean filed with a court or with the U.S. Department of Labor. On this reading of the statute, because Lambert and the other agents had taken their complaint to Sonics management, they had not “filed” a complaint within the meaning of the statute, and thus there was no cognizable retaliation.

Rehearing the case en banc, the Ninth Circuit vacated the panel’s decision in an opinion written by Judge Reinhardt. In holding that the FLSA anti-retaliation clause covers complaints made to employers, Judge Reinhardt’s opinion begins by setting out a substantive vision of the statute’s purpose. Most broadly, and quoting from a 1944 Supreme Court decision, the opinion argues that the FLSA is “remedial and humanitarian in purpose” and continues: “We are not here dealing with mere chattels or articles of trade but with the rights of those who toil Those are rights that Congress has specifically legislated to protect. *Such a statute must not be interpreted or applied in a narrow, grudging manner.*”¹⁹

More particularly, the opinion stresses that FLSA enforcement depends upon workers coming forward to assert their rights under the statute, and thus the statutory scheme can function only if the anti-retaliation clause eliminates the “fear of economic retaliation.”²⁰ In Judge Reinhardt’s words:

The FLSA’s anti-retaliation clause is designed to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act. Construing the anti-retaliation provision to exclude from its protection all those employees who seek to obtain fair treatment and a remedy for a perceived violation of the Act from their employers would jeopardize the protection promised by the provision and discourage employees from asserting their rights.²¹

Having reached a conclusion about the meaning of the anti-retaliation clause by examining the purpose and structure of the statute, the opinion then

17. *See id.*

18. 29 U.S.C. § 215(a)(3).

19. *Lambert*, 180 F.3d at 1003 (alteration in original) (quoting *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

20. *Id.*

21. *Id.* at 1004.

turns to examine the particular words of the clause. Here the Judge's practical experience is brought to bear. Unlike the panel, the en banc court finds that the phrase "filed any complaint" is broad enough to reach complaints, like the one here, made directly to employers. Why? Because, as Judge Reinhardt points out, in the parlance of the workplace, employees *file* grievances—usually in union shops, but in some non-union firms as well—with their employers. Finding it reasonable to assume that Congress was aware of this practice in 1938 when it drafted the FLSA, the court holds that complaints "filed" with employers are sufficient to satisfy the statute's requirement.²²

The *Lambert* opinion makes this point in a brief sentence or two, but it is worth pausing to observe that the point is undoubtedly correct. Indeed, at the time Congress drafted the FLSA and its anti-retaliation clause, the National Labor Relations Board itself used the term "filed" to describe internal firm grievance procedures.²³ Collective bargaining agreements drafted at the time also spoke of the "filing" of grievances by employees with their union or their employers. For example, the collective bargaining agreement signed in July 1937 between Teamsters Local 584 and Sheffield Farms Company stated that "[a]ny employee having a grievance shall have the privilege of filing such grievance with the steward within three days."²⁴ The same terminology is used to this day, with collective bargaining agreements routinely speaking of the "filing" of grievances or complaints by employees with employers, even in cases where the grievance is "filed" orally.²⁵

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22. The Supreme Court recently has granted certiorari to resolve a closely related question: whether oral complaints made to employers satisfy the requirements of the Fair Labor Standards Act's anti-retaliation clause. *See* Brief for the Petitioner at i, *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834 (June 16, 2010), 2010 WL 2481867.
 23. *See, e.g., In re Republic Steel Corp.*, 9 N.L.R.B. 219, 232 (1938) ("Requests for changes in rates of pay were to be considered closed upon a decision of the proper committee of Employee Representatives and the Management, unless an appeal was *filed in writing* by an employee or his Representative with the Management Representative within a period of 3 days after the decision was rendered.") (emphasis added).
 24. *In re Basile*, 10 N.Y.S.2d 24, 25 (N.Y. Spec. Term 1938).
 25. As one court has observed, in the standard collective bargaining agreement, "[i]n order to set the machinery of the grievance process in motion, the aggrieved employee [is] required to file a complaint with his or her immediate supervisor." *Dalton v. Jefferson Smurfit Corp.* (U.S.), 979 F. Supp. 1187, 1189 (S.D. Ohio 1997). By way of example, the collective bargaining agreement in force between the Service Employees International Union, Local 1199E-DC, and Maryland General Hospital states that "[a]ll grievances shall be presented orally . . . but the date of filing same shall be recorded on a form provided by the Hospital." Agreement Between Serv. Emps. Int'l Union, AFL-CIO Dist. 1199E-DC & Md. Gen. Hosp. § 13.4 (Dec. 1, 1999) (on file with author); *see also, e.g.,* Agreement Between Commc'ns Workers of Am. & Bell Atl. N.J., Inc. art. 74 (Aug. 9, 1998), *available at*

The *Lambert* opinion thus protects employees' ability to secure their own rights at work, and does so by relying on Judge Reinhardt's practical reasoning about the world of work. Beyond highlighting these twin themes of Reinhardt's labor and employment jurisprudence, the opinion also has a broader significance, one that impacts employees' ability to use employment law as a channel for *collective* action. As many have now explained, the federal statute expressly designed to protect workers' collective efforts to improve their work lives—the National Labor Relations Act (NLRA)—is largely dysfunctional. That law's narrow range of coverage, its weak remedies, and its time-consuming procedures mean that workers' rights to engage in concerted activity for mutual aid and protection are violated with near impunity.²⁶ In the face of the NLRA's failure, one potential alternative legal channel lies in employment laws like the FLSA. Workers can, and do, rely on employment statutes as both the locus of their collective efforts to secure workplace change and as the legal architecture that protects such collective action.²⁷ The ability of employment laws to function in this way turns, however, on the reach of the statutes' anti-retaliation clauses. By reading such clauses narrowly, courts foreclose one of the few viable avenues for workers' collective action. On the other hand, by reading these clauses broadly, courts enable a partial but important response to the pathology of the NLRA. In this light, then, Judge Reinhardt's opinion in *Lambert* provides employees with the opportunity to replace a failed statutory regime with a workable alternative: to use employment law as a form of labor law.

II. INSULATING WORKERS FROM IMMIGRATION-BASED RETALIATION

Lambert is in many ways the classic retaliation case: employees go to their employer to demand compliance with an employment statute, and they get fired for doing so. As the opinion makes clear, this type of employer conduct creates a "fear of economic retaliation" that is quite effective at deterring workers from attempting to vindicate workplace rights.²⁸ For immigrant

<http://irle.berkeley.edu/library/pdf/0298.pdf> ("Fourteen (14) days from the date the grievance is filed shall be allowed for adjustment of the grievance. . .").

26. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

27. For a discussion, see Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008).

28. *Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (en banc) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

workers, however, the fear of economic retaliation can be compounded by fears of immigration-based reprisal. Immigrant workers, that is, may be deterred from seeking to enforce workplace rights by the fear that their immigration status will become the focus of employer retribution.

This issue came before the Ninth Circuit in *Rivera v. NIBCO, Inc.*²⁹ The case involved twenty-three Latina and Southeast Asian female immigrants who worked on the production line at NIBCO's factory in Fresno, California. Although their job descriptions did not require English proficiency, NIBCO required the plaintiffs to take basic job skills examinations given only in English. The plaintiffs sued, alleging disparate impact discrimination based on national origin in violation of Title VII, and sought reinstatement along with back pay and punitive damages. During Martha Rivera's deposition, the employer's counsel asked Rivera where she was born; plaintiffs' counsel then moved for a protective order barring any further questions related to the plaintiffs' immigration status.³⁰

The circuit court heard an appeal from the district court's grant of the protective order. Judge Reinhardt's opinion begins, and in many ways ends, by casting the employer's deposition request as a threat: by asking about Rivera's immigration status, the court understands the employer implicitly to threaten Rivera with immigration consequences for her Title VII action. Such a threat is impermissible because—much like the employer's conduct in *Lambert*—it will have the effect of inhibiting workers' willingness to come forward and assert workplace rights. As Judge Reinhardt put it:

Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.³¹

This understanding of the employer's discovery request reflects, again, Judge Reinhardt's appreciation for the practical world of work. In Judge Reinhardt's view—one that is borne out by even a cursory review of the evidence—immigration status is used as a tool to deter enforcement of

29. 364 F.3d 1057 (9th Cir. 2004).

30. See *id.* at 1061.

31. *Id.* at 1065.

workplace rights.³² Returning to a favorite phrase, Judge Reinhardt thus writes that undocumented workers face an even “harsher reality” than documented workers; in addition to economic retaliation, these workers can face deportation or criminal proceedings when they claim rights at work.³³ Enabling immigrant workers to make such claims therefore requires that courts put immigration status off limits to this kind of discovery request.

NIBCO is more than a discovery case, however. In fact, the opinion is of major relevance to the general jurisprudence of workplace rights for undocumented workers, a population that now includes about eight million people.³⁴ For several decades, the Supreme Court and the courts of appeals fairly consistently read the definition of “employee” within labor and employment statutes to extend to undocumented immigrants.³⁵ In the 2002 case of *Hoffman Plastic Compounds*, however, the Supreme Court held that the NLRB may not award back pay to an undocumented immigrant who is discharged for engaging in protected union activity.³⁶ *Hoffman* makes it more difficult for workers—both the undocumented and those who work alongside them—to organize unions. But the *Hoffman* decision also raised the possibility that courts would begin to curtail the rights of undocumented employees under other federal labor and employment statutes. In *NIBCO*, the employer made an argument common in the years following *Hoffman*: by foreclosing remedies for undocumented immigrants under the NLRA, the Supreme Court

32. See *id.* at 1064 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886–87 (1984) (discussing how an employer reported five undocumented workers after they voted in favor of union representation)); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1055 (N.D. Cal. 1998); see also *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997).

33. *NIBCO*, 364 F.3d at 1064.

34. See JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (2009), available at <http://pewhispanic.org/reports/report.php?ReportID=107>.

35. See, e.g., *Sure-Tan*, 467 U.S. 883; *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50 (2d Cir. 1997). For some contrary positions, see, for example, *Agri Processor Co. v. NLRB*, 514 F.3d 1, 10–15 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), which argues that undocumented immigrants are not employees within the meaning of the National Labor Relations Act; and *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), which held that undocumented immigrants are not “qualified” for employment for purposes of Title VII remedies.

36. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The holding applies in cases where the employer is not aware of the worker’s immigration status at the time of hire. A different rule may apply in cases of a so-called knowing employer. See, e.g., *id.* at 153 (Breyer, J., dissenting).

has barred undocumented immigrants from seeking remedies under the full range of labor and employment statutes.

NIBCO constitutes something of a bulwark against such overbroad readings of *Hoffman*. In rejecting the employer's claim, the *NIBCO* court drew out three salient differences between the Title VII regime and the NLRA.³⁷ First, the court pointed out that the NLRA depends on agency enforcement, while Title VII relies heavily on private enforcement actions. Second, unlike in the NLRA, Congress provided Title VII plaintiffs with remedies, including punitive damages, designed to punish and deter employers who violate the statute. Finally, the Ninth Circuit stressed the fact that the *Hoffman* holding was grounded, in part, on the Supreme Court's unwillingness to defer to the NLRB's balancing of two competing federal statutes—labor law and immigration law. In a Title VII case, on the other hand, it is a federal court that does this balancing, and courts—the Ninth Circuit held—are precisely the right institutions to harmonize competing federal laws. This reasoning is important, not only because it clarifies why *Hoffman* is inapposite in the Title VII context. Its broader significance is that it reveals why *Hoffman* does not reach the many other employment regimes that share Title VII's structure rather than the NLRA's.

NIBCO is significant in a final, and perhaps even broader, way. Numerous courts have been called on to harmonize immigration and labor law—to resolve whether and how immigration status impacts the operation of federal labor and employment statutes.³⁸ If there is a common refrain in these cases, it is that immigration status simply trumps labor rights.³⁹ The cases that lie at the intersection of labor and immigration law, that is, do not reflect a careful balancing of these two statutory regimes. To the contrary, the cases evince an almost reflexive prioritization of immigration status over labor protections. *NIBCO*, of course, stands in stark contrast to this approach. The opinion takes seriously both federal regimes and, without impinging on the possibility for immigration enforcement, the decision allows for robust enforcement of workplace rights.

37. *NIBCO*, 364 F.3d at 1067–69.

38. See, e.g., *Hoffman Plastic Compounds*, 535 U.S. 137.

39. One clear example of this trend comes from a case, *Montero v. INS*, in which the Second Circuit summarized the rule in this way: “[The] application of prospective labor law remedies to undocumented aliens consistently has been dependent upon whether the alien is permitted by the INS to remain in the United States.” 124 F.3d 381, 384–85 (2d Cir. 1997).

III. UNION ORGANIZING

Our final case comes from the union context; and when it comes to legal protection for workers' efforts to improve their own terms and conditions of employment, the most obvious statutory source is the NLRA. Passed in 1935, that statute grants workers the right to engage in concerted activity for their mutual aid and protection.⁴⁰ Judge Reinhardt has authored a slew of opinions applying, and giving broad readings to, the core provisions of the NLRA.⁴¹ But to illustrate the twin themes of this Feature, it is best to look at a relatively recent decision involving unions' ability to organize new members.

In *United Food and Commercial Workers Union, Local 1036 v. NLRB* (UFCW), the union represented employees of several retail food establishments and sought to organize more firms in the same competitive market.⁴² A number of workers in the current bargaining unit objected to the union's use of their dues to organize new workers, and they charged the union with committing an unfair labor practice. The doctrinal background for the case came from the Supreme Court's *Communications Workers of America v. Beck* decision.⁴³ There, the Court held, inter alia, that a collective bargaining agreement may require all employees in a bargaining unit—even those individual “objectors” who do not want to be in the union—to pay union dues. But, according to the *Beck* Court, objectors may only be required to pay those dues that are “germane to collective bargaining.”⁴⁴ In *Beck*, the Court held explicitly that politics was not germane to collective bargaining, and so the union could not charge objectors for any of its political expenditures. But the *Beck* Court left open the broader question of which nonpolitical expenses were in fact germane to collective bargaining.

In the *UFCW* case, a three-judge panel of the Ninth Circuit held that organizing new union members was insufficiently related to bargaining on behalf of existing members to meet *Beck*'s test for germaneness.⁴⁵ For the three-judge panel, organizing additional employees and representing existing members were distinct enterprises—both part of the union's overall mission

40. 29 U.S.C. § 157 (2006).

41. See, e.g., *N. Mont. Health Care Ctr. v. NLRB*, 178 F.3d 1089 (9th Cir. 1999); *NLRB v. Wilder Constr. Co.*, 804 F.2d 1122 (9th Cir. 1986); *NLRB v. Cam Indus., Inc.*, 666 F.2d 411 (9th Cir. 1982).

42. 249 F.3d 1115 (9th Cir. 2001).

43. 487 U.S. 735 (1988).

44. *Id.* at 745.

45. *UFCW, Local 1036*, 249 F.3d at 1119–20.

but not related closely enough to warrant the imposition on objectors. But, in Judge Reinhardt's opinion for the en banc Ninth Circuit, the court reversed. The heart of the opinion begins with a statement about statutory purpose: "Organizing," Judge Reinhardt writes, "is central to the purpose of the NLRA."⁴⁶ It is only through organizing, the opinion continues, that workers can hope to bargain collectively to improve the terms and conditions of their employment.

So, what about the question before the court? Having stressed the centrality of organizing generally, how do we know whether organizing new members is germane to the project of bargaining on behalf of existing members? The opinion's reasoning is straightforward and flows from what Judge Reinhardt terms "the realities of collective bargaining."⁴⁷ As he put it:

The specific question here involves organizing outside the . . . bargaining unit, in particular the employees of competing employers. Such organizing may be crucial to improving the wages, benefits, and working conditions of employees in the bargaining unit The fact that an employer's competitors are not unionized, and likely pay lower wages and provide lesser benefits, significantly weakens the union's ability to bargain with the employer, and decreases the union's prospects of achieving the economic objectives of the members of the bargaining unit.⁴⁸

This statement is almost indisputably accurate—there is little question that a union's ability to organize an increasing share of a market enhances its ability to bargain on behalf of its existing members.⁴⁹ By reading the statute, and the relevant Supreme Court precedent, in light of these "realities," the *UFCW* court is able to reach a result that captures the real-world germaneness of new organizing: it is inseparable from collective bargaining because the outcomes of collective bargaining depend entirely on the extent of organization.

In *UFCW*, then, we again see the commitment to protecting workers' efforts to improve their work lives and the reliance on practical reasoning. The

46. *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 768 (9th Cir. 2002) (en banc).

47. *Id.*

48. *Id.* at 768-69.

49. See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 51 (1984) ("[T]he union wage premium depends strongly on the percentage of workers who are organized."); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, in *WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE* 79, 104 (James T. Bennett & Bruce E. Kaufman eds., 2007).

UFCW case also highlights a final, broader component of the Reinhardt labor jurisprudence: the Judge's commitment—in the face of profound social, cultural, and political trends in exactly the opposite direction—to protecting the *collective* rights of workers. Of course, when it passed the NLRA in 1935, Congress declared it to be the policy of the United States to protect “the exercise by workers of full freedom of association [and] self-organization . . . for the purpose of negotiating the terms and conditions of their employment.”⁵⁰ Section 7 of that statute, still very much the law today, grants to employees the affirmative “right to self-organization, to form, join or assist labor organizations, . . . and to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵¹ Despite the statutory commitment to collective action, however, there has been significant judicial skepticism about, and hostility toward, the central project of the NLRA. As many have recounted, both the Supreme Court and the courts of appeals have interpreted the NLRA in ways that have dramatically curtailed the statute's scope of coverage, the kinds of workers it protects, the type of conduct it enables, and the range of remedies it offers.⁵² Although there are numerous explanations for this judicial approach to the labor statute, it likely reflects (at least in part) some discomfort with the facilitation of *collective* action—a kind of “[d]iminished judicial respect for group action in the workplace,”⁵³ a “deemphasis of the rights of the group in favor of those of individual workers.”⁵⁴

The *UFCW* case is illustrative of Judge Reinhardt's contrary position. The case protects the collective rights of workers in a manner that requires some sacrifice of the interests of individuals: bargaining unit members who object to the union's use of their dues must pay up, irrespective of their objection. To be sure, Judge Reinhardt—and the *UFCW* court—believe that the union is requiring objectors to do something that ultimately will redound to the objectors' own benefit. The opinion nonetheless stands out as quite distinct

50. 29 U.S.C. § 151 (2006).

51. *Id.* § 157.

52. For some examples, see James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); and Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999).

53. Brudney, *supra* note 52, at 1591. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

54. Schiller, *supra* note 52, at 64.

from the more prevalent judicial privileging of individual rights and autonomy over the collective interests and power of the union.⁵⁵

★ ★ ★

Three cases cannot fully capture a labor and employment jurisprudence that—to date—includes more than 150 opinions. As the other Features in this Tribute reflect, moreover, an abiding concern for the ways in which law can be used to empower marginalized communities, and a judging style that strives to be grounded in the everyday realities of the litigants, are not unique to Judge Reinhardt’s labor and employment cases; to the contrary, these commitments appear across the full span of Judge Reinhardt’s work. These three cases, though, highlight two core themes of this jurisprudence: the Judge’s commitment to ensuring that law functions as a mechanism of worker empowerment, and his pragmatic approach to interpreting labor and employment statutes. The cases also reflect the centrality of Judge Reinhardt’s jurisprudence to the law of the workplace, a contribution that will endure long beyond the Judge’s extraordinary tenure on the bench.

55. Again, for an excellent historical account of this trend, see *id.*